82-2029

Supreme Court Case No. _____

IN THE UNITED STATES SUPREME COURT
October, 1982 Term

BARRY J. FAKIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

App. No. 82-5197

D.C. Docket No.
81-83-CR-T-H

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

ALBERT P. LIMA, P.A.
COUNSEL OF RECORD

and

EDNA ELLIOTT, J.D.,
P.A.
LIMA & ELLIOTT
620 Twiggs Street
Tampa, FL 33602
(813)228-8539

QUESTIONS PRESENTED FOR REVIEW

A. CAN A UNITED STATES CITIZEN BE IMPRISONED FOR SIMPLY COMPLYING WITH A SUBPOENA DUCES TECUM, AS RECORDS CUSTODIAN, WHEN THE RECORD CONTAINS AN UNTRUE STATEMENTS?

B. CAN A UNITED STATES CITIZEN BE IMPRISONED FOR FALSELY ANSWERING A QUESTION BEFORE A GRAND JURY WHERE A TRUTHFUL ANSWER COULD NOT HAVE CONCEIVABLY AIDED THE GRAND JURY INVESTIGATION?

C. CAN A DEFENDANT BE LAWFULLY SENTENCED TO CONSECUTIVE PRISON TERMS FOR TELLING THE SAME LIE TWICE?

TABLE OF CONTENTS

TABLE OF CONTENTS (Con't)

TABLE OF AUTHORITIES

REFERENCE TO REPORTS OF OPINIONS

There are no reports of the Orders of the United States District Court, Middle District of Florida or the Eleventh Circuit Court of Appeals in this cause.

STATEMENT OF JURISDICTION

A judgment of guilt against Petitioner was entered and dated February 4, 1982, as to two counts of a five-count indictment. The Petitioner was acquitted as to two additional counts and the fifth count was dismissed on motion of the United States. A timely appeal as a matter of right was taken to the Eleventh Circuit Court of Appeal, resulting in a per curiam affirmance without opinion by Order dated March 3, 1983. Petitioner's Petition for Rehearing was denied by the Eleventh Circuit Court of Appeals by Order dated April 11, 1983.

The jurisdictional basis for this Petition for Certiorari is grounded on this Court's discretionary review by certiorari pursuant to U.S. Supreme Court Rule 17. More specifically, this Court is requested to review:

(1) an issue for which there is no controlling precedent, to wit: what constitutes perjurious "use" of a subpoenaed document before a federal grand jury;

(2) a per curiam affirmance which has the effect of creating a conflict between the Eleventh Circuit Court of Appeals and the Second Circuit Court of Appeals as to the "materiality test" to be applied in federal perjury cases; and

(3) an issue as to whether the Defendant has been illegally sentenced to consecutive prison terms for the commission of a single crime.

STATUTES INVOLVED

§1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

18 U.S.C.A. §1623

STATEMENT OF THE CASE

The Petitioner was served with a subpoena duces tecum to appear at the United States District Court, Middle District of Florida, Federal Grand Jury Proceeding in February, 1981. (T: 189) Petitioner appeared and testified on March 3, 1981. (TGJ: 1-94) During the course of Petitioner's grand jury appearance, the following colloquy between the United States prosecutor and Petitioner occurred:

> "Q Who are the witnesses here?
>
> A That's Lester again and these are the two people in his office."
>
> (R: 23)

Prior to testifying, Petitioner delivered a mortgage to the grand jury purporting to have been witnessed by two persons. Petitioner was indicted by the same grand jury on August 6, 1981, via a five (5) count indictment

alleging in Count I with knowingly using a document containing a false material declaration and in Counts II through V with making a false material declaration under oath to a federal grand jury. (R: 1-14) The false statement of which Petitioner was convicted is the underlined portion of the above quotation wherein two signatures on the mortgages were falsely identified as two people in the notary's office. (R: 129A) The "use" of a false document arose from the mortgage purportedly witnessed by two persons.

The thrust of the grand jury probe was income tax evasion by persons other than Petitioner. Specifically at issue was the authenticity of a note and mortgage executed by the target of the grand jury investigation and whether they represented a true loan by Petitioner to the suspect taxpayer. (T: 165) The petit jury below acquitted the Petitioner

of substantive counts alleging that the loan was a sham and that Petitioner did not have sufficient cash to make such a loan. (R: 112)

A grand jury member, Mark Washabaugh, testified that in the grand jury investigation he believed that the State of Florida required three witnesses on a Mortgage Deed to be valid. (T: 168 and 173) Mr. Washabaugh further testified if the grand jury was taught the law incorrectly, it might have changed their minds as to what facts or factors in their investigation was material to the grand jury probe. (T: 176) Albert Cazin, a specialist in real property law and practicing attorney in the State of Florida (T: 716), testified that in Florida, there is no requirement a mortgage deed be witnessed, but it must be notarized. (T: 720) Herb Sturman, an attorney from California and government witness, stated witnesses on a mortgage deed were superfluous in California

because the document need only to be notarized. (T: 547)

Lester Spinrad testified that he was an official notary public of the State of California, did properly and lawfully notarize said documents on July 15, 1978 in California (T: 484-488), the date it was executed in his office by Arlene Bykeefer (T: 481, 483), and he did not back-date the Mortgage Deed. (T: 493-494)

Petitioner was never asked in the grand jury proceedings directly if he saw the witnesses sign the Mortgage (T: 833) or if he signed their names. (T: 831) The sole question posed to Petitioner as to the purported witnesses was, "Who are the witnesses here?" (R: 23) Petitioner falsely identified the witnesses as two persons in the notary's office to the grand jury. (R: 23)

Petitioner admitted at trial that he

did, in fact, place the two signatures of Sharon Tompai and Jon Pettey on the Mortgage Deed as witnesses, but he was under the impression that witnesses were not necessary in either the State of California or Florida. (T: 829-830)

Additionally, Petitioner was charged with and convicted of "use" of a false document, to wit: presentation of the mortgage to the grand jury falsely purporting to be witnessed by two persons who did not in fact act as witnesses. (R: 21-23, 112, 129A) It is undisputed that the mortgage was involuntarily produced by service of a subpoena duces tecum. (T: 189)

Petitioner made Motions for Judgment of Acquittal at the end of the Government's case (T: 678) which were denied by the trial court. (T: 705) The Petitioner renewed his Motion for Judgment of Acquittal, after the defense rested, and said Motion was again

denied. (T: 1047-1048)

The Petitioner was found guilty of Counts I and II and sentenced on February 4, 1982 to imprisonment for five years as to Count I and to five years on Count II to be served consecutively. (R: 129-A)

BASIS OF DISTRICT COURT JURISDICTION

Jurisdiction of the United States District Court, Middle District of Florida, was based on a federal question under 18 U.S.C.A. §1623, False declarations before grand jury or court.

ARGUMENT

A. CAN A UNITED STATES CITIZEN BE IMPRISONED FOR SIMPLY COMPLYING WITH A SUBPOENA DUCES TECUM, AS RECORDS CUSTODIAN, WHEN THE RECORD CONTAINS AN UNTRUE STATEMENT?

The Petitioner in this cause finds himself imprisoned for up to ten years because he had the misfortune to be the records custodian of a mortgage securing a debt owed by a suspect taxpayer. The false statement appeared in the portion of a mortgage which purported to bear the witness signatures of Sharon Tompaii and Jon Pettey. (R: 21-22)

The applicable statute provides:

> "Whoever under oath ... in any proceeding before ... any ... grand jury of the United States knowingly ... uses any information, including any ... document ...

> knowing the same to contain any false material declaration, shall be ... imprisoned not more than five years ...."
> 18 U.S.C.A. §1623 (emphasis added)

The compelling questions presented by this Petition are, is a witness "using" a document merely by responding to a valid subpoena? By responding to the prosecutor's questions? Certainly, this cannot be true, otherwise the citizens of this country are faced with a choice between the proverbial rock and a hard place - - punishment for contempt for non-compliance with a subpoena duces tecum, or a conviction for §1623 "use" perjury for compliance with the subpoena.

There is a paucity of caselaw defining or explaining the meaning of the term "use" within the purview of 18 U.S.C.A. §1623. In United States v. Dudley, the Fifth Circuit Court of Appeals left unanswered the question of whether the mere identification of a document constitutes a "use" subjecting the

witness to perjury sanctions. 591 F.2d. 1193 (5th Cir. Fla. 1978). This Petitioner respectfully suggests to this Court that that issue is ripe in the case at bar and, that this issue is important and compelling, not only to the instant Petitioner, but also to the thousands of records custodians who are subpoenaed before grand juries throughout the United States.

For the Court's convenience, Petitioner has excerpted all of the Petitioner's grand jury testimony which relates to the subject mortgage. See, Appendix D. A careful review of this testimony reveals that on each occasion the mortgage was drawn into the colloquy, it was the questioning of the prosecutor which repeatedly brought the mortgage to the forefront.

The material question then is, did the Petitioner "use" the mortgage falsely purported to have been witnessed? The Fifth Circuit

Court of Appeals in Dudley, supra, held that the affirmative presentation of a document to the grand jury, coupled with explicit adoption of its veracity or testimonial reliance on the document would constitute use. United States v. Dudley, supra at 1197. It is clear from the Dudley case that it was the Defendant Dudley who relied on the veracity of the contents of the false document at trial. Such is not the case for Petitioner Fakier. Petitioner simply responded to repeated questions from the prosecutor drawing his attention back to the mortgage. See, Appendix D. Throughout all this questioning, the prosecutor never expressly questioned Petitioner about the admitted falsity contained in the mortgage, to wit: the purported witnesses' signatures.

The procedure utilized by the instant prosecutor necessarily brings to mind this Court's criticism of prosecutorial ineptitude

in questioning in Bronston v. United States. 409 U.S. 352 (1973). The affirmance of a conviction grounded on the prosecutors' lack of acuity in questioning Petitioner squarely conflicts with this Court's decision in Bronston. As shown by Appendix D, the instant prosecutor skirted all around the issue of whether or not the purported witnesses actually witnessed and signed the mortgage; he substantially mis-read their names; he received unresponsive or evasive answers from the Petitioner, and then he simply dropped the ball. This record is totally devoid of any question or even an unsolicited answer as to whether or not the purported witnesses actually witnessed the mortgage. This fact cannot be disputed by the government. Yet despite the undisputed failure of the prosecutor to carry out his duties, the United States has charged, convicted and imprisoned the Petitioner!

In Bronston this Court carefully set forth the responsibilities of prosecutors in grand jury proceedings, even to the point of protecting intentional perjurers:

> "We perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert - as every examiner ought to be - to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witness to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it....It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination, in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.
>
> * * *
>
> The burden is on the questioner

> to pin the witness down to the specific object of the questioner's inquiry.
>
> * * *
>
> Precise questioning is imperative as a predicate for the offense of perjury.
>
> It may well be that petitioner's answers were not guileless, but were shrewdly calculated to evade ... Nevertheless ... any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Bronston, supra, at 358, 359, 360, 362; emphasis added.

Before the serious sanction of a perjury conviction should be sanctioned by this Court, it is the government's burden to prove beyond all reasonable doubt that the Petitioner knowingly used that portion of the document containing the false statement. The government should not be permitted a victory by technical knockout either by negligently or intentionally omitting the crucial question and arguing instead that it was the witness' defalcation

of duty which justified the conviction. A conviction resting on the government's own negligence cannot be allowed to stand.

Perjury, whether verbal or non-verbal, is an intentional act, e.g. "whoever ... knowingly ...." 18 U.S.C.A. §1623. Petitioner Fakier had no duty to disclose to the grand jury information not asked. In order to affirm Fakier's conviction for "use" of a document containing a false statement, this Court must assume that Petitioner would have lied if the appropriate question had been posed. Under the American system of justice, alleged criminals are not "assumed" into prison. United States v. Brumley, 560 F.2d. 1268 (5th Cir. Ga. 1977).

Surely "use" as intended by Congress encompasses something more than responding to a subpoena duces tecum or inept prosecutorial questioning. A criminal statute should be construed narrowly to criminalize only

that conduct which Congress intended. United States v. Dudley, supra at 1197. Even the standard dictionary definition of the term contemplates some intentional act by the "user":

> "To make use of, to convert to one's service, to avail oneself of, to employ."
> Black's Law Dictionary (4th Edition)

> "1. to employ for some purpose; put into service; make use of; ... 2. to avail oneself of; apply to one's own purpose."
> The American College Dictionary (Random House, Inc. 1962) (emphasis added)

In what way did Petitioner apply the existence of mortgage witnesses "to his own purpose?" In fact, Petitioner, did not initiate any "use" of the mortgage whatsoever. He simply responded to questions posed by the prosecutor about the mortgage. Significantly, the prosecution wholly failed to prove those counts charging that the entire loan transaction was a sham.

If we assume arguendo, that Petitioner did "use" the document in responding to questioning, how does this Statute apply to a document which is false only in part? In Dudley, supra, the document was clearly false in toto. At best, Petitioner's responses held forth that there was in fact a true loan underlying the mortgage. The petit jury apparently agreed. Petitioner was acquitted of participating in a sham loan. When Petitioner was never questioned about the actual witnessing, the only false statement on the document, how can he have been convicted of a perjurious "use" of a document which was otherwise true?

An affirmance of Petitioner's conviction for "use" will create a precedent, at least within the Middle District of Florida, which has the practical effect of creating a heretofore unknown duty on grand jury record

custodian witnesses that they must, after taking the oath, affirmatively disclose any known false statements lurking about in their documents, regardless of the actual questioning, upon penalty of a federal perjury conviction. If this is in fact the opinion of this Court, Petitioner respectfully suggests to the Court that as a matter of due process unwitting grand jury witnesses are entitled to a warning at the commencement of their testimony of the scope of their duty to disclose, and the serious penalty for failure to disclose.

B. CAN A UNITED STATES CITIZEN BE IMPRISONED FOR FALSELY ANSWERING A QUESTION BEFORE A GRAND JURY WHEN A TRUTHFUL ANSWER COULD NOT HAVE CONCEIVABLY AIDED THE GRAND JURY INVESTIGATION?

The elements of the offense of perjury or false statements before a grand jury are that the statement must have been false, material and made by the Defendant with knowledge of its falsity. United States v. Dudley, 591 F.2d. 1193 (5th Cir. Fla. 1978). The particular false statement resulting in Petitioner's conviction was the underlined portion of his answer to the following question propounded by the prosecutor:

"Q Who are the witnesses here?

A That's Lester again and these

are two people in his office."*
(R: 23)

The Petitioner admitted at trial having given a false statement to the grand jury. (T: 829, 830) Accordingly, the issue presented is whether the false statement was material to the particular grand jury investigation.

Materiality is an essential element of the statutory offense which the government has the burden of proving. United States v. Mancuso, 458 F.2d. 275, 280 (2nd Cir. NY 1973). The issue of whether a declaration is material is a question of law to be determined by the Court. United States v. Dudley, supra. The primary test for determining whether a particular false statement is material within the purview of 18 U.S.C.A. §1623 is whether the statement is capable

*The Petitioner was charged only with falsely identifying two of the witnesses' signatures as people in Lester's office. The superceding indictment did not allege "Lester" to be a false witness.

of influencing the grand jury's investigation. United States v. Dudley, supra.

The grand jury at bar was investigating possible tax fraud by Arlene Bykeefer (the mortgagee in the mortgage described above) and others, and in particular, was investigating whether the loan evidenced by the Fakier-Bykeefer mortgage was a true loan or a sham. (T: 154, 155, 164-167) Under Florida State law, to be valid, a mortgage need only be signed by the mortgagor and acknowledged before a notary public. Fla. Stat. §695.03; Wickes Corp. v. Moxley, 342 So.2d. 839 (2nd D.C.A. Fla. 1977); Windle v. Sebold, 241 So.2d. 165 (4th D.C.A. Fla. 1970). It is abundantly clear from the following testimony, however, that the investigating grand jury improperly believed that the mortgage was invalid unless signed by three witnesses:

"Q What difference would it have made to the grand jury if the

second and third witnesses on there hadn't actually witnessed that document and, indeed, their signatures were forgeries?

A The grand jury would not have believed that the document was legal. In the State of Florida it requires three witnesses. I don't know about California, but Florida is - - requires three witnesses."

(T: 168)

* * *

"Q Now, if statements made to you or things you thought were true were incorrect, would that have changed your determination of what was important and what wasn't important in your investigation?

A If they were incorrect."

(T: 176; emphasis added)

It is clear from the foregoing colloquy that the grand jury was misled as to the importance of the presence or absence of legitimate witnesses on the mortgage, resulting from a clear misapprehension of the law. Assuming a material issue before the grand jury was whether the mortgage was

evidence of a true loan, the existence of witnesses on the mortgage itself was immaterial from a legal standpoint as to the validity of the mortgage.*

The district judge held that the mere identities of the purported witnesses to the mortgage and whether or not they had actually signed the mortgage was material to the grand jury's inquiry as to the loan's validity and authenticity. (T: 701) In so doing, however, the district judge overlooked the second prong of the two-tier test of materiality. In affirming the conviction, the Eleventh Circuit Court of Appeals has created a conflict with the Second Circuit as to the proper test to be used in determining whether a statement is "material" within the purview of 18 U.S.C.A. §1623.

*It should be noted that the Petitioner was wholly acquitted as to those counts alleging that the Petitioner participated in the alleged sham loan. (R: 94)

The inquiry as to materiality does not end with the determination as to whether the answer is capable of influencing the grand jury. The Second Circuit Court of Appeals has held if the statement is found to be capable of influencing the grand jury the trial court is next required to examine the nature of the grand jury's inquiry and the testimony at trial introduced to prove falsity in order to determine whether a truthful answer could conceivably have aided the grand jury investigation. United States v. Mancuso, 485 Fo.2d. 275, 280, 281 (2nd Cir. NY 1973). Materiality does not simply turn on whether the question on its face could conceivably have evoked a material reply. Id. at fn 17, p. 281.

The ultimate issue is, therefore, whether the government has shown that a truthful answer could possibly have assisted the grand jury in its tax evasion investigation

of parties other than Petitioner. In this case, neither the answer the Petitioner gave nor the truth he allegedly concealed, could have impeded or furthered the investigation.

If one examines the false answer given, it is obvious that the answer provided ammunition for further investigation rather than impeding any investigation. By identifying the two witnesses, the Petitioner actually gave the grand jury additional theoretical witnesses to pursue. On the other hand, a truthful answer to the question "who are these people" would have simply been:

> "Sharon Tompai is a former girlfriend and Jon Pettey is a friend and former neighbor, however, I signed their names to the mortgage. They were not present."

No additional leads would have resulted from this information; no new witnesses would have been revealed. In other words, the government in this cause has wholly failed to prove that

the Petitioner's false statement was material, i.e., that a truthful answer such as set forth above could have assisted the grand jury investigation. Accordingly, under the Mancuso test, the false statement was not "material," and the Petitioner's pretrial Motion to Dismiss the Indictment and Rule 29 Motion for Judgment of Acquittal as to Count I should have been granted, as a matter of law. Petitioner respectfully suggests to the Court that the proper test of materiality is that of the Second Circuit in Mancuso, and that the inherent conflict created by the Eleventh Circuit affirmance of Petitioner's conviction must be resolved by reversal of Petitioner's conviction.

Since both the verbal perjury and the non-verbal "use" perjury arise from the misidentification of the witnesses to the mortgage, the failure of the government to prove

that "materiality" of these false statements mandates that both counts must fail as a matter of law, and Petitioner's conviction be reversed in toto.

C. CAN A DEFENDANT BE LAWFULLY SENTENCED TO CONSECUTIVE PRISON TERMS FOR TELLING THE SAME LIE TWICE?

The Petitioner was convicted of two counts of violating 18 U.S.C.A. §1623 and sentenced to two consecutive five-year prison terms for those convictions. Nevertheless, Petitioner contends that the act giving rise to Petitioner's conviction for false testimony and use of a document containing a false declaration is a single act, and accordingly, Petitioner should only be subject to a single punishment.

Multiplicity is defined as the charging of a single offense in more than one count. Count I charged Petitioner as follows:

> "4. At the time and place aforesaid, BARRY J. FAKIER, while under oath before the Grand Jury, knowingly used a document, namely an alleged mortgage deed purporting to have been executed on July 15,

1978, between Arlene Bykeefer, as mortgagor, and BARRY J. FAKIER, as mortgagee, securing $250,000 in funds, knowing the same to contain a false declaration, to wit: that Sharon Tompai and Jon Pettey (sic) had witnessed by their own signatures the mortgage deed as signed, sealed and delivered in their presence, whereas, BARRY J. FAKIER then well knew and believed, Sharon Tompai and Jon Pettey (sic) had not been present and had not placed their signatures on the document as witnesses."
(R: 21, 22)

Count II of the Superceding Indictment charged Petitioner as follows:

"4. At the time and place aforesaid, BARRY J. FAKIER, during the course of his testimony and while under oath before the Grand Jury, knowingly made a false declaration, as follows: (False declaration is underlined)

* * *

Q Who are the witnesses here?

A That's Lester again and these are two people in his office."
(R: 22, 23)

It is clear from the foregoing allegations

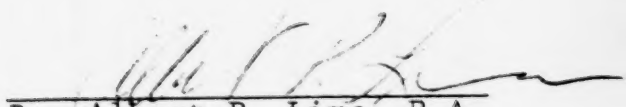
that Petitioner's conviction on each count results from the single act of presumably identifying Sharon Tompai and Jon Pettey as actual witnesses to the execution of the mortgage. The fact that the government has couched one count in terms of use of a written false declaration and the other in terms of a verbal mis-identification does not avoid the problem of multiplicity. It clearly would have been improper for the government to bludgeon a lying grand jury witness by repeating and rephrasing the same question so as to create additional perjury charges. United States v. de la Torre, 634 F.2d. 792 (5th Cir. Tex. 1981). The Fifth Circuit Court of Appeals pointed out in United States v. Dudley, supra, the potential problem as to whether using a false document and testifying falsely as to its authenticity would constitute in fact only one crime, but left the question

unanswered as the defendant in Dudley had been sentenced to only one sentence or concurrent sentences. United States v. Dudley, supra. Once again a question left unanswered in Dudley is ripe for determination in the case at bar, as it is clear that this Petitioner has been sentenced to two consecutive terms for the same alleged criminal act, to wit: the mis-identification of Sharon Tompai and Jon Pettey as witnesses. As noted in Dudley, the appropriate remedy where multiplicitous indictments result in accumulative sentences, is to remand the case to District Court for dismissal of one count. Accordingly, even it this Court finds that the false statements given or used were material and that Petitioner affirmatively "used" a false document, the judgment should be reversed for imposition of a maximum penalty of five years.

WHEREFORE, Petitioner prays that the Court will grant his Petition for Certiorari.

Respectfully submitted,

LIMA & ELLIOTT



By: Albert P. Lima, P.A.
COUNSEL OF RECORD and
Edna Elliott, J.D., P.A.
620 Twiggs Street
Tampa, FL 33602
(813)228-8539

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Certiorari was furnished by U.S. Mail this 10th day of June, 1983 to Stephen S. Cowen, Assistant U.S. Attorney, Room 410, 500 Zack Street, Tampa, FL, 33602 and to Lawrence Scott, 625 Twiggs Street, Suite 202, Tampa, FL, 33602, and three copies of the Petition for Certiorari was furnished to the Honorable Rex Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20001.

LIMA & ELLIOTT

Albert P. Lima, P.A.
COUNSEL OF RECORD
and
Edna Elliott, J.D., P.A.
620 Twiggs Street
Tampa, FL 33602
(813)228-8539

A P P E N D I X

APPENDICES
TABLE OF CONTENTS

APPENDIX A

United States District Court For
MIDDLE DISTRICT OF FLORIDA - TAMPA

United States of America vs.

Defendant) / BARRY J. FAKIER /

Docket No. /81-00083-Cr-T-H/

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date

Month	Date	Year
02	04	1982

Counsel

/__/ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

/__/ WITH COUNSEL / Lawrence Scott & Albert Lima, Esq. /
(Name of counsel)

Plea	/__/ GUILTY, and the court being satisfied that there is a factual basis for the plea, /__/ NOLO CONTENDERE, /XX/ NOT GUILTY
Finding & Judgment	There being a verdict of /__/ NOT GUILTY. Defendant is discharged /XX/ GUILTY. Defendant has been convicted as charged of the offense(s) of while under oath before the Grand Jury, did knowingly used a document, namely an alleged mortgage deed purporting to have been executed on July 15, 1978 knowing the same to contain a false material declaration, to wit: That mortgator's had witnessed by their own signatures the mortgage deed as signed, sealed, and delivered in their presence, whereas mortgagor's had not been present and had not placed their signatures on the documents as witnesses, in violation of Title 18, United States Code, Section 1623, as charged in Counts 1 and 2 of the indictment.

_____	)The court asked whether defendant)had anything to say why judgment)should not be pronounced. Because)no sufficient cause to the contrary)was shown, or appeared to the court,)the court adjudged the defendant)guilty as charged and convicted and
Sentence Or Probation Order	)ordered that: The defendant is)hereby committed to the custody of)the Attorney General or his author-)ized representative for imprison-)ment for a period of FIVE (5) YEARS)as to Count 1, and FIVE (5) YEARS)as to Count 2, sentence imposed as)to Count 2 shall run consecutively)with sentence imposed as to Count 1,)or until the defendant is otherwise)discharged as provided by law.
Special Conditions Of Probation	)
Additional Conditions of Probation	)In addition to the special conditions)of probation imposed above, it is)hereby ordered that the general)conditions of probation set out on)the reverse side of this judgment)be imposed. The Court may change)the conditions of probation, reduce)or extend the period of probation,)and at any time during the probation)period or within a maximum probation)period of five years permitted by)law, may issue a warrant and revoke)probation for a violation occurring)during the probation period.
	_____ _____ _____

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed By

/__/ U.S. District Judge

/__/ U.S. Magistrate

/s/
WM. TERRELL HODGES

Date February 4, 1982

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5197

D.C. Docket No. 81-83-CR-T-H

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRY J. FAKIER,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida

(March 3, 1983)

Before GODBOLD, Chief Judge, and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

ISSUED AS MANDATE: APR 26 1983

APPENDIX C

Order, dated April 11, 1983, is not available. See Motion for Extension of Time.

APPENDIX D

Excerpts re: "USE" Evidence

Defendant's Grand Jury Testimony*

"Q Now, have you brought with you any documents to this Grand Jury?

A Yes, sir, I have. (TGJ-p.4, lines 20, 21)

* * *

"Q ...And then attached to it is a mortgage deed which says it is executed July 15, 1978 by Arlene Bykeefer, the mortgagor, to Barry J. Fakier, the mortgagee.

The documentary stamp shows that this mortgage deed was not filed until October 12, 1979; is that correct? (TGJ-p.5, lines 16-20)

A That's correct, sir. (TGJ-p.5, line 21)

Q Although it is dated July 15, 1978; is that correct? (TGJ-p.5, lines 22, 23)

A That's correct. (TGJ-p.5, line 24)

* * *

*The symbol "TGJ" refers to the transcript of the Defendant's grand jury testimony.

"Q ...Now, these are all the documents you have that are responsive to that subpoena; is that correct? (TGJ-p.7, lines 13, 14)

A Yes, sir. (TGJ-p.7, line 15)

* * *

"Q Can you tell me from these documents what the date was that you met them? The precise date? (TGJ-p.16, lines 12, 13)

A I would have met Arlene on three occasions, July of 1978, December of 1978, February of 1979; and then I met Jerome in September of 1979. (TGJ-p.16, lines 14-16)

* * *

"Q All right, what happened there? (TGJ-p.21, line 10)

A She presented me with the mortgage that you have here, this exhibit, and the note. (TGJ-p.21, lines 11, 12)

Q Will you show me which documents, please, she showed you? (TGJ-p.21, lines 13, 14)

A Certainly, this was in there; this was there; and this was there. (TGJ-p.21, lines 15, 16)

* * *

"Q And she also presented you with a mortgage deed dated July 15, 1978 between herself and you.

A That's correct. (TGJ-p.22, lines 4-6)

* * *

"Q ...Now, the mortgage is dated July 15, 1978; is that correct?

A That is correct. (TGJ-p.25, lines 18-20)

* * *

"Q How were you ever going to establish if she wanted to say that you never had loaned her the money? How were you going to establish she had received it since you were dealing in currency and not in checks? (TGJ-p.27, lines 24, 25; p.28, lines 1, 2)

A Well, she had already signed the mortgage deed, notarized in the State of California, that she had received the money. (TGJ-p.28, lines 3-5)

* * *

"Q All right.

A He represented himself as Arlene's attorney and said that he would personally guarantee me that the last $35,000 would not be given

to Arlene until he had the satisfaction of mortgage. And that's why my document's not filed until October. Because I could have filed it in July but I hadn't given the last document - - I hadn't given - - I beg your pardon. I hadn't given her the last payment.

Q You say your document. You mean your mortgage - -

A My mortgage.

Q - - wasn't filed until October of 1979 even though it had been executed in July of 1978.

A That's correct, sir.

Q What security did you have between those two dates that you would ever get your money back since you had not filed your mortgage?

A Well, I had a notarized mortgage deed - - (TGJ-p.29, lines 7-24)

* * *

"Q Did he discuss with you the explanation for the more than one year gap in filing the recorded - - in filing the mortgage? Did he discuss with you the explanation for that?

A Well, I had the document.

Q All right.

A It was in my possession. I'm the one that held back the filing until the final payment was made. And as I told you, it wasn't made in July, it wasn't made until September, pending getting Mr. Sutton's satisfaction of mortgage. (TGJ-p.35, lines 1-6)

* * *

"Q If I go ahead and have this paper analyzed, I am going to be able to find out the paper was paper that was manufactured in 1978, not in 1979, I assume?

A I am sure you will, sir.

Q Because it was signed in 1978, like you testified; is that correct?

A That's correct, sir.

Q July, 1978.

A Yes, sir.

Q It wasn't all made up in September of 1979 or around then and then filed right after it was all made up?

A No, sir.

Q And it was Jerome Pratt who handed you what documents in September of 1979? Anything? Did he give you

any documents?

A No, sir. He picked up the $35,000. (TGJ-p.80, lines 9-24)

* * *

"Q On this note for $25,000, that's Arlene Bykeefer's name over on the right-hand side - -

A Yes, sir.

Q - - Looks like her signature. What's the signature on the lef-hand side?

A That's Lester Spinrad, the same person that notarized the document. - - That's also his signature.

Q Who are the witnesses here?

A That's Lester again and these are two people in his office.

Q Sharon Pompai and it looks like Tom Petty.* You don't know who they are? Those are people in Mr. Spinrad's office, is that correct?

A You know how you get things witnessed in a Notary Public's office." (TGJ-p.84, lines 16-25; p.85, lines 1-5)

*Actually the names signed were Sharon Tompai and Jon Pettey.